



IDAHO PUBLIC CHARTER SCHOOL COMMISSION

304 North 8th Street, Room 242 • P.O. Box 83720 • Boise, ID 83720

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PUBLIC CHARTER SCHOOL COMMISSION SPECIAL MEETING

August 1, 2019

700 W. Jefferson Street, Boise, Idaho

Idaho State Capitol Building, East Wing 41

1-720-279-0026

Listen Only Code: 2759486

Participant Code: 292948

AGENDA

Thursday, August 1, 2019 – 700 W. Jefferson Street, Boise, ID, EW 41, 9:00 a.m.

A. COMMISSION WORK

1. Agenda Review / Approval (Action Item)

B. PUBLIC COMMENT

Public comment will be limited to three minutes per person. If you wish to provide public comment, or if auxiliary aids or services are needed for individuals with disabilities, please contact the PCSC office at (208) 332-1561 at least 24 hours in advance of the meeting, or sign in at the meeting location before the meeting opens.

Written comment may be submitted to the PCSC during the meeting, via mail at P.O. Box 83720, Boise, Idaho, 83720, or electronically at pcsc@osbe.idaho.gov.

C. OTHER

1. Consideration of Report and Notice of Alleged Violations of the Idaho Open Meetings Law with Opportunity to Cure and Recommendations from the Office of the Attorney General (Action Item)
2. Open Meeting Law Training provided by Assistant Chief Deputy Attorney General Brian Kane (Action Item)

August 1, 2019

1. Agenda Approval

Does the Public Charter School Commission have any changes or additions to the agenda?

COMMISSION ACTION

A motion to approve the agenda as submitted.

August 1, 2019

Public Comment

Public comment will be limited to three minutes per person. If you wish to provide public comment, or if auxiliary aids or services are needed for individuals with disabilities, please contact the PCSC office at (208) 332-1561 at least 24 hours in advance of the meeting, or sign in at the meeting location before the meeting opens.

Written comment may be submitted to the PCSC during the meeting, via mail at P.O. Box 83720, Boise, Idaho, 83720, or electronically at pcsc@osbe.idaho.gov.

Board Members, Superintendent Ybarra, and Governor Little:

In reference to the recent controversy involving the accidental release of a recorded executive session by the Charter School Commission, I would like to offer my perspective as a charter school administrator. Without weighing in on the specific issue of the legality of the executive session, I want to make known my support of Tamara Baysinger and Kirsten Pochop and the work they are doing to promote and support *quality* charter schools while maintaining a system of accountability.

These two women take the Commission's mission statement seriously, and work hard to "[protect] student and public interests by balancing high standards of accountability with respect for the autonomy of public charter schools" and "ensure the excellence of public charter school options available to Idaho families." Contrary to the arguments made by complainants, the Commission is charged with more than simply "approving new charter schools"; it is responsible for ensuring that taxpayer money is not squandered and families' trust in their education system is not betrayed with inferior "product."

The further assertion that "few charter schools can survive" the "tangled web of academic standards" to which we are held is proven patently false by the glut of charter schools atop the state's list of top schools. In addition, the fact that only a very few Commission-authorized schools are feeling threatened provides a clear indication that the bar is not unreasonably high. These are low-performing schools, who, in the estimation of those charged with holding them accountable, are not meeting the standard that so many other schools manage to meet.

In my experience with Commission staff—specifically Ms. Baysinger and Ms. Pochop—I have felt supported and trusted. My school's relationship with them has been entirely positive and open. They notify me of concerns and allow me to address them; I call for advice and they provide it willingly and without judgment. This is not a team "designed to set charter schools up for failure"; rather, they make efforts to know and support their schools and uphold the legislative intent of their commission, which is to "hold the schools...accountable for meeting measurable educational standards."

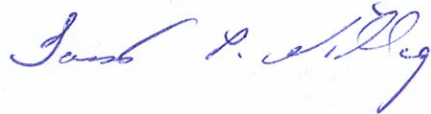
In a recent article, Terry Ryan, former head of the Idaho Charter School Network—whose job really IS to support charter schools—states that authorizers are "the lead quality-control agent for Idaho's charter schools." He goes on to point out the difference between charter schools and traditional public schools—specifically, that persistently underperforming charter schools "...should either close or not be renewed by their authorizers." Even the designated "cheerleader" for charter schools believes it is the job of the commission to close charters that fail to meet reasonable standards.

It is very important to the wellbeing and reputation of Idaho's charter school community and the integrity of the commission charged with maintaining it that the executive session issue remain isolated from the fine work of the Commission and its staff. Please know that the opinions of the vocal minority of underperforming charter schools

does not represent those of the majority. I am a charter school administrator, but I am also an Idaho taxpayer. To me, accountability from those who use my tax dollars is more important than their feelings. I have full confidence in the Idaho Charter School Commission staff to continue to provide this accountability.

I offer my full support of the Charter School Commission, Tamara Baysinger, Kirsten Pochop, and the rest of the Commission staff as they carry out the difficult and vital work of maintaining quality charter schools in Idaho.

Sincerely,



Daniel P. Nicklay
Principal
Coeur d'Alene Charter Academy

From: [Mark Hansen](#)
To: [PCSC](#); [Matt Freeman](#); [Jenifer Marcus](#)
Subject: Fwd: Aug 1st meeting
Date: Wednesday, July 31, 2019 11:32:47 PM

I would like to submit this letter for the Aug 1st Special Meeting for the Charter Commission. Please read at the meeting.

I would like to know why four schools only received a letter of financial concern when there was five schools. Tamara's friends with ISTCS Director and that is why ISTCS did not get a letter. I would also like to know why Tamara modified schools annual reports for schools renewing their performance certificates after the November 15th deadline. You hear Tamara comment at the beginning of the executive session stating she modified public records, got caught and that was why the commission could not shut the schools down. Again Tamara modified the records to make it easier to shut the schools down. I would like to know why Tamara, Sherilynn Bair and Julie VanOrden did not state they had a conflict of interest while dealing with the Blackfoot Charter Schools. Julie lives in the Snake River School District and was a board member for years. Sherilynn works at Snake River School District. Sherilynn also has a daughter that was on the board at ISTCS. Tamara is good friends with the director at ISTCS. Snake River School District and Idaho Science and Technology Charter School are both competing school districts and both schools stand to gain financially if the charter commission shuts down the Blackfoot Charter Schools. These three individuals having conflicts of interest were the most critical in the recording. Sherilynn even stuck up for ISTCS having bad math scores and started to say she had a personal and then stopped.

This commission can never be trusted and have shown their agendas. They will go to any extent to do what Tamara wants. Most of the board members were board members from public school districts and not interested in charter schools. Charter schools were never intended to be better than the public schools as they stated in the tape. Charter Schools offer choice for students and parents. The commission should be ashamed for wanting to shut down a school for catering to special needs children because they do not have better scores better than the local district. The harassment needs to stop.

Tamera needs to be fired for modifying records and leading the scandal. Allen Reed needs to resign for being overall responsible and allowing the behavior to continue and being part of the problem. The lawyer even told them to stop and Allen said to rewind the slide show so they could continue to break the open meeting laws. Julie and Sherilynn need to resign for their comments and not identifying a conflict of interest. The charter commission should go away and be authorized by the state board of education.

Thank You

Mark Hansen

Board Members, Superintendent Ybarra, Governor Little, Mr. Speaker, and President Pro Tempore;

In reference to the recent controversy involving the executive session by the Charter School Commission, I would like to offer my perspective as a charter school founder and administrator. I do not wish to comment on the legality of the session itself, but rather the larger picture that has been lost in all the emotion.

After 33 years combined in education, my wife Colleen and I started STEM Charter Academy in our living room 10 years ago. It took us 3 years to open it. During that time, we had conversations and countless e-mails back and forth with Tamara Baysinger. In those days Ms. Baysinger WAS the only staff at the commission and she always had time for us. A lot of what Ms. Baysinger had to say to us was not always what we wanted to hear, but it was necessary in order for us to be successful and do what is best for all students. To this day, we credit a lot of our early and continued success to her guidance during that time. Her continued guidance has helped us as we have consistently tried to raise the bar for students in our area. We have watched and listened as she has tried to help other schools during commission meetings. It is not her fault if they don't heed her advice.

A lot has been made by this out of state, for profit, lobbying group about the commission being "Anti-Charter." It would be generous to call this hyperbole. It is in fact just not true. Being anti- *bad* Charter isn't being anti-charter any more than being anti- *illegal* immigration is being anti-immigration. This well-funded group has been requesting directories from every charter school in the state and trying to create a lynch-mob mentality in order to muddy the water enough so we will lose sight of the fact that their schools are low performing and should probably be closed or at least overhauled.

The Attorney General has issued his recommendations, and I believe they are reasonable. The commission and staff should acknowledge their mistakes, maybe even apologize, and receive some training. I know the low performing schools would like some "Heads to roll" but getting rid of an incredibly competent individual in Ms. Baysinger or any other staff at the commission in the name of political correctness would be a huge mistake. It will only embolden these schools to ignore and bully the next staff member in that position and render the commission toothless.

Most of us in the charter movement like accountability, we feel it sets us apart. We are free to innovate and free to fail, but we know that IF we fail there will be consequences. Allowing these schools to get a pass because of this error would set the movement back.

Accountability works both ways, the commission made mistakes. These schools have been performing below average for years. What is worse? I'm sorry that some people's feelings were hurt by what was said on the tape, but in a state where fewer than half our kids are proficient in math and barely over half are proficient in language, I don't think hurt feelings should be our priority.

Please allow the commission staff to stay in-tact with some training and give them the tools they need to close bad schools and support *quality* schools in the next legislative session.

Thank you.

Scott Thomson & Colleen Thomson
Executive Director & Co-founders
STEM Charter Academy
A Free K-12 Public School of Choice

SUBJECT

Consideration of Report and Notice of Alleged Violations of the Idaho Open Meetings Law with Opportunity to Cure and Recommendations from the Office of the Attorney General

APPLICABLE STATUTE, RULE, OR POLICY

Idaho Code § 74-201 through 74-208

BACKGROUND

The Idaho Office of the Attorney General (OAG) received several complaints alleging that the Public Charter School Commission (PCSC) violated Idaho's Open Meetings Law during its regular meeting on April 11, 2019. Upon investigation, the OAG has concluded that probable cause exists for the OAG to bring a complaint against the PCSC for violating Open Meetings Law.

DISCUSSION

The OAG's report, which is included with these materials, cites three alleged violations of Open Meeting Law. The report describes the PCSC's opportunity to cure the alleged violations by taking specific actions, including:

- Publicly acknowledging the violations;
- Receiving training in Open Meetings Law, and
- Ensuring that any decisions stemming from the alleged conduct in violation of the Open Meetings Law be set aside within a properly noticed and conducted meeting.

The report further offers recommend best practices that the PCSC may consider for adoption in order to enhance its compliance with the Open Meetings Law.

The PCSC must notify the OAG within 14 days regarding whether the recommendations are acceptable and to establish a timeline for compliance.

IMPACT

The PCSC may cure the alleged violations by taking the actions described in the OAG's report.

Failure to cure the alleged violations will result in the OAG's office filing an Open Meetings Complain under Idaho Code § 74-208(5).

STAFF COMMENTS AND RECOMMENDATIONS

Staff recommends that the PCSC cure the alleged violations and adopt the recommendations offered by the OAG in its July 25, 2019 Report and Notice of Alleged Violations of the Idaho Open Meetings Law with Opportunity to Cure, and direct staff to notify the OAG accordingly.

COMMISSION ACTION

A motion to accept the Office of Attorney General July 25, 2019 Report and Notice of Alleged Violation of the Idaho Open Meeting Law with the Opportunity Cure and adopt the cures as set forth in the Report and Notice. Accordingly:

1. The Commission acknowledges that the following open meeting violations occurred during the April 11, 2019 executive session:
 - a) The agenda failed to identify the executive session as an action item; and
 - b) The discussion during the executive session drifted into several topics for which the executive session is not provided and which were not identified in the motion for executive session.
2. The Commission will go through Open Meeting Law training conducted by an Idaho Attorney General's office representative.

and

3. Although the Commission took no identifiable action nor made any decision during the April 11 executive session that must be set aside, to the extent that any discussion or sharing of information occurred that could impact any future decision or action by the Commission, such discussion or exchange of information shall be disregarded in its entirety.

And also

4. To adopt the recommended best practices to enhance the Commission's future compliance with the Open Meeting Law as provided by the Office of Attorney General in its July 25, 2019 Report and Notice of Alleged Violations of the Idaho Open Meetings Law with Opportunity to Cure.



STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WASDEN

July 25, 2019

Transmitted Via Electronic Mail

Chairman Alan Reed
Director Tamara Baysinger
Idaho Public Charter School Commission
304 North 8th St., Ste. 242
Boise, ID 83702
pcsc@osbe.idaho.gov
tamara.baysinger@osbe.idaho.gov
becky.ophus@ag.idaho.gov

Re: Notice of Violation of Idaho's Open Meetings Law and Opportunity to Cure

Dear Chairman Reed and Director Baysinger:

Our office received several complaints alleging that the Public Charter School Commission ("PCSC") violated Idaho's Open Meetings Law ("OML") at its meeting on April 11, 2019. Pursuant to statutory authority vested in the Attorney General under Idaho Code § 74-208(5), our office has investigated the allegations and concluded that probable cause exists for this office to bring a complaint against the PCSC for violating the OML for the following:

- Failing to properly identify the executive session as an action item as required by Idaho Code § 74-204(4);
- Changing the topic within executive session to topics not identified as a basis for entering executive session as prohibited by Idaho Code § 74-206(2); and
- Discussing topics for which executive session is not provided as prohibited by Idaho Code § 74-206(2).

This office recommends that the PCSC cure these violations by taking the following actions immediately:

Chairman Alan Reed
Director Tamara Baysinger
Idaho Public Charter School Commission
July 25, 2019
Page 2

- Acknowledge publicly that it violated the OML during its meeting on April 11, 2019 by: (a) failing to identify the executive session as an action item in the agenda, and (b) allowing the discussion during executive session to drift into several topics for which executive session is not provided and which were not identified in the motion for executive session.
- Schedule a training on the OML within 60 days of the PCSC's acknowledgment of the violation(s) to be conducted by a representative of the Idaho Attorney General's Office. The public and press should be invited to observe this training.
- If any decisions or final actions stem from the alleged conduct in violation of the OML, those decisions or actions shall be set aside within a properly noticed and conducted meeting under the OML.

This office also recommends the adoption of several best practices to ensure future compliance. Those recommendations and the findings of our investigation are laid out in detail in the enclosed report. Copies of the report will be provided to the complainants and to representatives of the media upon request.

Please notify this office within fourteen (14) days as to whether these recommendations are acceptable and establish a timetable for compliance. Failure to cure the alleged violations will result in this office filing an Open Meetings Complaint under Idaho Code § 74-208(5). Please direct any questions or correspondence to Assistant Chief Deputy Brian Kane at (208) 334-2400 or brian.kane@ag.idaho.gov.

Sincerely,



BRIAN KANE
Assistant Chief Deputy

BK:kw
Enclosure

cc: Matt Freeman
Briana LeClaire
Joseph Borton
Amy White
Jeff Pierson



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

LAWRENCE G. WASDEN

REPORT AND NOTICE OF ALLEGED VIOLATIONS OF THE IDAHO OPEN MEETINGS LAW WITH OPPORTUNITY TO CURE

July 25, 2019

This report is the result of an investigation into four complaints received by this office. The first was received from Briana LeClaire on June 24, 2019. The second was received on July 1, 2019 from Borton-Lakey Law & Policy on behalf of the Heritage Academy Public Charter School in Jerome, Idaho. The third was from the Jerome Public Charter School, dated July 21, 2019. The fourth was from Anderson, Julian & Hull, attorneys for several charter schools, and was received on July 2, 2019. All of the complaints question the validity of the Public Charter School Commission (“PCSC” or “Commission”) actions during its meeting on April 11, 2019 with regard to compliance with Idaho’s Open Meetings Law (“OML”). Two of the complaints in addition to questioning the PCSC’s conduct, specifically requested that this office investigate the complaint. This office is assigned the duty to investigate complaints such as these by statute. This report contains the findings and analysis in fulfillment of that statutory responsibility, along with recommendations for the PCSC’s consideration.

I. AUTHORITY AND SCOPE

This office is investigating this matter pursuant to the authority vested in the Attorney General under Idaho Code § 74-208(5) to enforce violations of the OML by

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Located at 700 W. Jefferson Street, Suite 210

public agencies of the state government. “Public agency” is defined to encompass various categories of governmental entities and subdivisions at all levels of government including, but not limited to, “[a]ny state . . . commission . . . created by or pursuant to statute” Idaho Code § 74-202(4). The PCSC is a state commission that is created by statute pursuant to Idaho Code § 33-5213. It is therefore a public agency within the meaning of the OML and subject to the enforcement authority of this office.

To avoid any conflict of interest, the investigation was conducted and this report was generated exclusively by staff within the Civil Litigation Division with no connection to the PCSC or its members. The PCSC is advised by a deputy attorney general within the Contracts and Administrative Law Division. Based upon the separate reporting and supervisory structures of these separate divisions, the investigation was “walled off” from the Deputy who regularly advises the PCSC. This “walling off” enabled the Civil Litigation Division to conduct a thorough and objective investigation of these complaints.

This office’s authority under Idaho Code § 74-208(5) extends only to an analysis of whether the OML was violated. That authority does not include an assessment of whether any other law may have been violated. It does not include an assessment of policy positions, the substance of any statements made by members of the PCSC, or conduct of members of the PCSC generally. Therefore, pursuant to that statutory authority, the scope of the investigation and this report are restricted to an analysis of whether probable cause exists for this office to bring a complaint for violating the OML against the PCSC. If any complainant believes that a law in addition to the OML has been violated, those violations should be reported to the appropriate law enforcement entities. *See* Idaho Code § 31-2227. This office has no authority or oversight over the substance or policy pronouncements of

the PCSC.¹ Any complaints regarding the policy positions or statements of the PCSC or its members should be addressed to the PCSC or its appointing authorities.

II. FACTS

On April 11, 2019, the PCSC held a public meeting. During that meeting, the PCSC went into executive session for approximately two hours. A Deputy Attorney General was present throughout the meeting including the executive session. The agenda for the meeting identifies the executive session as an item under the heading “E. OTHER.” The executive session is labeled, in relevant part:

5. Executive Session: Renewal Conditions Status Update
 - i. Pursuant to Idaho Code Section 74-206(1)(d), to consider records that are exempt from disclosure as provided in Chapter 1, title 74, Idaho Code.²

The agenda does not label the executive session as an action item.

There was a valid open meeting held prior to executive session. A motion was made to enter executive session by the presiding member of the PCSC. The presiding officer identified the consideration of records exempt from disclosure under subsection 74-206(1)(d) of the OML as the purpose for the executive session when he made the motion to enter executive session. A roll call vote was conducted in open session and it was unanimously approved. The vote of every member who participated was recorded in the minutes.

¹ On page 2 of the complaint filed by the Heritage Academy Public Charter School, there is an allegation seeking an investigation of “disparaging remarks.” This allegation is beyond the scope of this office’s authority. This office only evaluates whether the statements could be made within an executive session, not whether they are appropriate or reflect bias within the Commission. This complaint should be addressed to the Commission itself, or perhaps the Commission’s appointing authorities.

² The agenda for the meeting on April 11, 2019 originally cited “Chapter 3, title 9, Idaho Code.” The agenda was then amended to cite “Chapter 1, title 74, Idaho Code.” Our analysis is based on the amended agenda.

Chapter 1, title 74, contains Idaho's Public Records Act. The agenda, minutes and motion for executive session identify chapter 1, title 74, of the Idaho Code as the basis for the executive session. However, they do not identify Idaho Code § 74-104(1) ("public records exempt from disclosure by federal or state law"), which is the specific provision of the Public Records Act exempting the records under consideration in this case.

During executive session, staff provided the Commissioners with an update regarding the status of compliance with charter school renewal conditions. Several charter schools have renewal conditions related to student proficiency. In order to gauge progress toward compliance, staff presented the Commissioners with a PowerPoint presentation that included student data at several charter schools that would be considered for renewal in upcoming years. That data included, among other things, proficiency rates from state and national assessment results; special education data; demographic data; four-year aggregate cohort graduation rate ("ACGR") data that was not broken down by demographics; and student information related to degree, diploma, credential attainment, drop out data, attendance and mobility. The presentation of student data at a particular school occasionally juxtaposed or combined student data exempt from disclosure under Idaho Code § 33-133 and the federal Family Education Rights and Privacy Act ("FERPA") with data not exempt from disclosure.

The discussion focused on student data at several charter schools. However, on several occasions throughout the session, the discussion drifted to other topics that did not

involve consideration of student data. The most significant discussions that did not consider student data are as follows:³

- Commissioners' personal familiarity with a particular math instructor. The Commissioners discussed, among other things, that the instructor was married to a nephew of one of the commissioners, that she left a job because a charter school had given her a job offer she could not refuse, and that the instructor's father-in-law had medical issues. The discussion then drifted to the topic of schools that make financial commitments even though the school has no plan to fulfill those obligations.
- Criticism of a school in general and the town where the school is located. On several occasions during discussion of student data at a particular school, Commissioners interjected with comments about the school in general and the town where the school is located. These comments include statements such as "What do we do as a society with that town?" "Who would ever send their kids there?" "Would anyone in this room ever send their kids there?" One Commissioner suggested opening an ice cream shop and another responded, "ice cream doesn't grow brain cells." Another Commissioner remarked several minutes later during a discussion of a charter school in a neighboring town, "Man, if I lived in [the town where the school is located], I'd drive all the way out there!"
- Evaluation of the performance of a school administrator. The discussion of a school's student data drifted to a critical evaluation of the school's administrator. Commissioners discussed the administrator's name; that she is unhappy with the PCSC; that the administrator believed that the children in her school could never meet the renewal standard; that she does not believe charter schools should be better than traditional schools; that she does not think parents of the children at her school want a school that performs better than a traditional school; and that the administrator was happy that proficiency levels fell from 10% to 5% so that the school could receive more money.
- Evaluation of the performance of another school administrator. The discussion of a different school's student data drifted to a complementary evaluation of the performance of the administrator. Specifically, Commissioners and staff discussed that he is a former high school math instructor; that he has implemented looping instruction for fourth, fifth and sixth graders; that he has created a culture of experimentation at the school; and that he organized a field trip to the East Coast and worked through spring break.

³ This list is not meant to include every occasion during executive session in which a member of the PCSC made a statement unrelated to student data. It is meant to capture the occasions in which the most significant deviations in topic occurred for purposes of an analysis of whether, as a whole, the discussion during executive session complied with the OML.

- The process by which the PCSC would deny renewal of a school's charter. Specifically, on several occasions, the PCSC discussed how it should approach members of the legislature in advance of denial in order to achieve political buy-in. At different points during the executive session, they discussed how they could present student data to legislators without running afoul of Idaho Code; the process staff would undertake in advance of any such decision; the best way to prepare legislators for a possible decision that could result in a school's closure; and they discussed the risk of parents speaking out in favor of a school even though the data indicates the school is not serving their child's best interests.
- The success of the Montessori educational program generally. The PCSC's discussion of student data at a particular charter school drifted into general commentary about the difficulties created at schools where high school enrollment numbers are minimal compared to online enrollment such that the school's virtual program is paying for the on-site program. This discussion then drifted to the success of the Montessori program generally compared to other educational programs.

Neither the Deputy Attorney General nor members of the PCSC present during executive session spoke up or attempted to redirect the topic of conversation when the discussion drifted from consideration of exempt student data to these topics. At the end of the executive session, the Deputy Attorney General present advised the Commissioners to return to open session because they were done with the presentation of exempt material. After the session was over, the public session was reconvened and the meeting was properly adjourned.

III. ANALYSIS

The complaints allege that the PCSC violated the OML during executive session at a regular meeting on April 11, 2019. This office concludes that probable cause exists for this office to bring a complaint for violating the OML against the PCSC for the following:

- a. Failing to properly identify the executive session as an action item as required by Idaho Code § 74-204(4);

- b. Changing the topic within executive session to topics not identified as a basis for entering executive session as prohibited by Idaho Code § 74-206(2); and
- c. Discussing topics for which executive session is not provided as prohibited by Idaho Code § 74-206(2).

If any decisions or final actions stem from the alleged conduct in violation of the OML, those decisions or actions shall be set aside within a properly noticed and conducted meeting under the OML.⁴ The PCSC shall schedule a training on the OML within 60 days of the PCSC's acknowledgment of the violation(s) to be conducted by a representative of the Idaho Attorney General's Office. The public and press should be invited to observe this training.

1. The Agenda.

The agenda for the April 11, 2019 meeting is deficient in two ways. First, the agenda does not identify the executive session as an action item as required by Idaho Code § 74-204(4). In July of 2018 an amendment to the OML came into effect requiring an agenda item that requires a vote to be identified on the agenda as an "action item." *See* Idaho Code § 74-204(4); 2018 Idaho Sess. Laws 502-03 (H.B. 611). Executive sessions require a motion identifying the specific subsection authorizing the executive session, a roll call vote of the board members, and the vote recorded within the minutes. Idaho Code § 74-206(1). Executive sessions are therefore "action items" as defined under the OML and should be labeled as such in the agenda for any meeting in which they occur.

⁴ Based on the recording provided to this office, it does not appear that any decision or final action was taken, but this office recommends that the Commission closely evaluate its conduct in consultation with its attorney to be certain.

This office recognizes that this provision is relatively new and that the Commission may still be adjusting to its requirements. Therefore, this office recommends moving forward that the Commission clearly identify the motion to enter the executive session as an “action item” within future agendas. The Commission may want to take the additional step of reminding attendees that no action can or will be taken in the executive session, and that any necessary action will occur in open session in compliance with the OML.

Second, the agenda fails to adequately specify the basis for executive session. Idaho Code § 74-204(3) requires agendas for public meetings in which an executive session will be held to “state the reason and the specific provision of law authorizing the executive session.” The agenda item for the executive session appears under the heading “E. OTHER.” For purposes of clarity, agenda items for executive session should be offset and specifically identified with their own heading.

The provision of law authorizing the executive session identified in the agenda is: “Pursuant to Idaho Code Section 74-206(1)(d), to consider records that are exempt from disclosure as provided in Chapter 74, title 1, Idaho Code.” Though the agenda identifies the specific subsection of the OML authorizing the executive session, this office recommends that an agenda item for an executive session based on consideration of records exempt from disclosure should identify the specific provision(s) on which the exemption is based. Chapter 1, title 74 contains Idaho’s Public Records Act. A general reference to the Public Records Act does not provide a level of specificity consistent with the general agenda requirement that all topics of discussion be noted within the agenda. Identification of the public records exemption serves the purpose of providing notice to the public

regarding the substance of the executive session without breaching the confidentiality of the executive session.

2. The Executive Session.

Exceptions under the OML are to be construed narrowly. Idaho Code § 74-206(2). It is a violation of the OML “to change the subject within the executive session to one not identified within the motion to enter the executive session or to any topic for which an executive session is not provided.” Idaho Code § 74-206(2). The PCSC went into executive session for the purpose of considering student data exempt from public disclosure under state and federal law.⁵ Consideration of confidential student data is a proper basis for executive session.

However, it appears that the PCSC violated the OML during the executive session.⁶ On several occasions, the topic of discussion drifted from student data to topics that:

- (a) Are not topics for which an executive session is provided; and
- (b) Were not specifically identified in the motion for executive session.

Topics identified during investigation within this category include: the Commissioners’ personal familiarity with a particular math instructor; criticism of a school in general and the town where the school is located; the process by which the PCSC would deny renewal of a school’s charter and generate political buy-in for that decision; and the success of the Montessori educational program generally.

⁵ Both the Idaho Student Data Accessibility, Transparency and Accountability Act of 2014, (Idaho Code § 33-133) and the federal Family Education Rights and Privacy Act, 20 U.S.C. § 1232 (FERPA) protect personally identifiable information in student education records from public disclosure.

⁶ This office’s analysis does not include a discussion of every instance in which a comment was made by someone present during executive session that is not directly tied to the consideration of student data. Analysis considered the frequency and degree to which discussion throughout the session as a whole drifted to topics not appropriate for executive session.

This office's understanding of the student data indicates it is not rationally connected to these topics of discussion. Idaho Code § 74-206(2) expressly prohibits an entity from discussing "any topic for which an executive session is not provided." Therefore, these discussions should not have taken place within executive session. It is the frequency and degree of drift throughout the session as a whole that, in this office's view, constitutes a violation of the OML, particularly when considering the presumption of openness and narrow interpretation of exceptions to the law. Based upon the lengthy and meandering discussion within the executive session, it appears possible to identify numerous potential violations of the OML.

Also, on two different occasions during the executive session, the topic of discussion drifted from student data to an evaluation of the performance of administrators at two schools. The evaluation of an administrator of a public charter school is likely a proper basis for executive session under Idaho Code § 74-206(1)(b). But Idaho Code § 74-206(2) expressly limits executive sessions to those noticed on the agenda, and relied upon within the motion, and prohibits the changing of the topic within the executive session to one for which executive session is not provided. The only topic identified was consideration of exempt information under Idaho Code § 74-206(1)(d). No other topic was identified on the agenda or within the motion. Comparing the agenda and the motion to the topics actually discussed, it appears that this provision of the OML was violated.

Paramount within service on a government board is the responsibility to follow the law and speak up when others do not. In a setting such as an executive session, the duty of self-policing is at its highest. Through a wide-ranging and lengthy executive session, neither the Deputy Attorney General representing the Commission, any member of the

Commission, or any staff members present spoke up to advise the Commission to return to the proper topic. Late within the executive session, the Deputy Attorney General present encouraged the PCSC to go back into an open meeting because the executive session materials had been concluded. However, by that point the discussion during executive session had impermissibly drifted without corrective action. Although a failure to speak up within an executive session is not a violation of the OML, this office recommends empowering all attendees who are members of the Commission, attorneys, and other Commission staff members to speak up during executive sessions to keep the Commission on topic and avoid running afoul of the law.

IV. RECOMMENDATIONS

Recognizing that probable cause exists to bring a complaint against the PCSC, Idaho Code § 74-208(7) permits an entity such as the PCSC to “cure” a violation upon receipt of an alleged violation. This report constitutes notice to the PCSC of the alleged violation(s). This office recommends that the PCSC cure these violations consistent with the process set forth in Idaho Code § 74-208(7)(a) by taking the following actions immediately:

- Acknowledge publicly that it violated the OML during its meeting on April 11, 2019 by (a) failing to identify the executive session as an action item in the agenda; and (b) allowing the discussion during executive session to drift into several topics for which executive session is not provided and which were not identified in the motion for executive session.
- The PCSC shall schedule a training on the OML within 60 days of the PCSC’s acknowledgment of the violation(s) to be conducted by a representative of the

Idaho Attorney General's Office. The public and press should be invited to observe this training.

- If any decisions or final actions stem from the alleged conduct in violation of the OML, those decisions or actions shall be set aside within a properly noticed and conducted meeting under the OML.

In addition to the cure requirements above, this office recommends that the Commission consider the adoption of the following recommendations as best practices to enhance compliance with the OML:

- On future agendas:
 - Identify executive sessions as an “action item” in any agenda for a meeting in which they are expected to occur;
 - Offset agenda items for executive sessions separately and label them clearly; and
 - Identify the specific provision under the Idaho Public Records Act that provides the basis for the an executive session held pursuant to Idaho Code § 74-206(1)(d).
- This office makes the following recommendations to avoid topic drift during executive session:
 - Monitor the discussion and speak up to keep the discussion on topic;
 - Identify inappropriate departures from the exception under which the entity went into executive session;
 - Keep the discussion within the parameters of the exception under a narrow interpretation of its scope;

- Advise and assist those participating in the discussion to employ corrective action immediately when topic drift occurs; and
- Ensure that executive sessions are focused and as brief as possible.

The PCSC should notify this office within 14 days as to whether these recommendations are acceptable and establish a timetable for compliance. *See* Idaho Code § 74-208(7)(a)(ii). Failure to cure the alleged violations as outlined above will result in this office filing an Open Meetings Complaint under Idaho Code § 74-208(5).

SUBJECT

Open Meeting Law Training

APPLICABLE STATUTE, RULE, OR POLICY

Idaho Code § 74-201 through 74-208

BACKGROUND

The Idaho Office of the Attorney General (OAG) has advised the Public Charter School Commission (PCSC) to receive training in Open Meetings Law.

DISCUSSION

Assistant Chief Deputy Attorney General Brian Kane will provide training in Open Meetings Law.

IMPACT

Participation in Open Meetings Law training conducted by a representative of the Idaho Attorney General's Office represents an action by the PCSC to cure violations of Open Meeting Law that occurred during the PCSC's meeting on April 11, 2019.

STAFF COMMENTS AND RECOMMENDATIONS

Staff has no comments or recommendations.

COMMISSION ACTION

Any action would be at the discretion of the PCSC.

**Office of the
Attorney General**

**Idaho
Open Meeting Law
Manual**

Idaho Code §§ 74-201 through 74-208



JULY 2018

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State of Idaho Office of Attorney General Lawrence Wasden

INTRODUCTION

Open and honest government is fundamental to a free society. The Idaho Legislature formalized our state's commitment to open government by enacting the Idaho Open Meeting Law in 1974. The Open Meeting Law codifies a simple, but fundamental, Idaho value: The public's business ought to be done in public.

One of my duties as Attorney General is to ensure that state agencies and officials comply with the Idaho Open Meeting Law. The 44 elected county prosecuting attorneys have the same duty with regard to agencies and officials of local government.

My office is committed to assisting Idaho's state and local officials in complying with their obligation under this law. Toward that end, my office regularly conducts training sessions for state and local officials throughout Idaho.

My office has prepared this updated manual for your use and reference. This manual's purpose is to inform government agencies of their obligations, and citizens of their rights, under Idaho's Open Meeting Law.

Sincerely,

LAWRENCE G. WAsDEN
Attorney General

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**POLICY CONSIDERATIONS UNDERLYING THE OPEN
MEETING LAW**

The Idaho Open Meeting Law¹ was designed to ensure transparency of the legislative and administrative processes within state and local governments. The Legislature articulated this policy in the Act's first section:

The people of the state of Idaho in creating the instruments of government that serve them, do not yield their sovereignty to the agencies so created. Therefore, the legislature finds and declares that it is the policy of this state that the formation of public policy is public business and shall not be conducted in secret.²

Open meetings offer the public a chance to observe the way their government operates and to influence their government in positive and important ways. Closed meetings often can lead to distrust of governmental decisions and acts.

Those who conduct meetings must remember this policy above all when deciding whether a meeting should be open. If a meeting is closed, there must be a compelling reason, supported by the statute itself, or by subsequent court rulings.

Remember, when in doubt, open the meeting.

¹ Idaho Code §§ 74-201 to 74-208 (2015).

² *Id.* at § 74-201.

QUESTIONS AND ANSWERS

PUBLIC BODIES OR AGENCIES COVERED BY THE OPEN MEETING LAW

Question No. 1: What public bodies or agencies are subject to the Open Meeting Law?

Answer: The Open Meeting Law provides: “All meetings of a *governing body* of a *public agency* shall be open to the public and all persons shall be permitted to attend any meeting except as otherwise provided by this act. . . .”³ “Governing body” is defined to mean the members of any public agency “with the authority to make decisions for or recommendations to a public agency regarding any matter.”⁴ “Public agency” is defined to encompass various categories of governmental entities and subdivisions at all levels of government.⁵ The governing bodies of public agencies that are created by or pursuant to statute, as well as public agencies that are created by the Idaho Constitution, are subject to the Open Meeting Law.⁶ The only public agencies that are statutorily exempt from the Open Meeting Law are the courts and their agencies and divisions, the judicial council and the district magistrates commission.⁷ Deliberations of the Board of Tax Appeals, the Public Utilities Commission and the Industrial Commission, in a fully submitted contested case proceeding, are also exempted from the requirement that they take place in open public meeting.⁸

Question No. 2: Does the Open Meeting Law apply to a public agency headed by a single individual as contrasted with a multi-member body?

Answer: No. Section 74-202(5) defines a governing body to mean “the members of any public agency *that consists of two (2) or more members*, with the authority to make decisions for or recommendations to a public agency regarding any matter.” (Emphasis added.) By definition, the Open Meeting Law applies only to a governing body which consists of two or more members

³ Idaho Code § 74-203(1) (emphasis added).

⁴ Idaho Code § 74-202(5).

⁵ Idaho Code § 74-202(4).

⁶ Attorney General Opinion No. 77-30

⁷ Idaho Code § 74-202(4)(a).

⁸ Idaho Code § 74-203.

and thus does not apply to a public agency headed by a single individual.

This also extends to *employees* of a public agency headed by a single individual; meetings held by employees of a department headed by a single individual (or multiple parties, for that matter) do not have to be open to the public. An illustrative example of this principle arose in the 2008 case of *Safe Air For Everyone v. Idaho State Dep't of Agriculture*.⁹ There, the Idaho State Department of Agriculture (ISDA) invited representatives from federal, state, and tribal agencies to a meeting to discuss issues surrounding crop residue burning. The meeting was closed to the public. Several employees of the ISDA attended the meeting, but the director did not.

An environmental group sued the ISDA, arguing that the employees' participation in the meeting constituted a violation of the Open Meeting Law because the director had delegated decision-making authority to the employees, thus making the employees a "governing body." The Supreme Court disagreed, stating that

[b]y definition, a 'governing body' [under the Act] must have 'the authority to make decisions for or recommendations to a public agency regarding any matter.' The employees do not have 'the authority' to make decisions for or recommendations to the ISDA. Any decision they make can be countermanded by a supervisor, and their supervisor can likewise deny them permission to make recommendations. . . . [T]he authority to make decisions for the agency or recommendations to the agency must be statutorily based.¹⁰

Of course, it should be noted that under the Idaho Administrative Procedure Act (A.P.A.) various state agencies must hold open public meetings when they adopt rules or when they determine certain contested cases.¹¹ The open public meeting requirements of the A.P.A. apply regardless of whether the public agency is headed by a single individual or by a multi-member body.

⁹ 145 Idaho 164, 177 P.3d 378 (2008).

¹⁰ *Id.* at 168, 177 P.3d at 382.

¹¹ Idaho Code § 67-5201 to 67-5292.

Question No. 3: When is a subagency of a public agency subject to the Open Meeting Law?

Answer: A subagency of a public agency is subject to the Open Meeting Law if the subagency itself “is created by or pursuant to statute or executive order of the governor, ordinance or other legislative act.”¹² In *Cathcart v. Anderson*, the Washington Supreme Court interpreted a Washington statute similar to section 74-202(4)(d). The court held that, under the language “created by or pursuant to,” it is not necessary that a statute, ordinance or other legislative act expressly create a subagency so long as there is an enabling provision which allows that subagency to come into existence at some future time.

Question No. 4: Are advisory committees, boards and commissions subject to the Open Meeting Law?

Answer: The Open Meeting Law defines “public agency” to include “any subagency of a public agency which is created by or pursuant to statute or executive order of the governor, ordinance, or other legislative act,”¹³ and “governing body” to include any body “with the authority to make decisions for or *recommendations* to a public agency regarding any matter.”¹⁴ Thus, advisory committees, boards and commissions are subject to the Open Meeting Law if the body is created by or pursuant to statute, ordinance, or other legislative act and if the body has authority to make recommendations to a public agency.

In contrast, an administrative committee, board or commission is not subject to the Open Meeting Law if it is not entrusted with the formation of public policy, but merely carries out the public policy established by a governing body, and if its activities do not constitute the making of “decisions for or recommendations to” a public agency.¹⁵ Likewise, the Open Meeting Law does not apply to voluntary, internal staff meetings if the group is not created by or pursuant to statute, ordinance or other legislative act, even though the discussions may lead to recommendations to the governing

¹² Idaho Code § 74-202(4)(d); *Cathcart v. Anderson*, 85 Wash. 2d 102, 530 P.2d 313 (1975); Attorney General Opinion No. 7-75.

¹³ Idaho Code § 74-202(4)(d).

¹⁴ Idaho Code § 74-202(5) (emphasis added).

¹⁵ *Idaho Water Resources Board v. Kramer*, 97 Idaho 535, 572, 548 P.2d 45, 72 (1976).

body.¹⁶ Generally, however, if you are ever unsure of whether a meeting should be open, it is this Office's recommendation to err on the side of opening the meeting.

Question No. 5: Does the Open Meeting Law apply to the governor?

Answer: The Open Meeting Law has no application to the governor when he is acting in his official executive capacity, since the Open Meeting Law does not apply to a public agency headed by a single individual.

**CHARITABLE ORGANIZATIONS (501C(3)) AND
HOMEOWNER'S ASSOCIATIONS**

Question No. 6: Do charitable organizations have to comply with the Idaho Open Meeting Law?

Answer: The Open Meeting Law applies only to governmental entities. Typically, charitable organizations are private. Generally, nonprofit organizations are governed by their chartering documents and bylaws. Additionally, Title 30, Chapter 3 of the Idaho Code, provides the legal foundation for Idaho nonprofits. Consult the chartering documents, bylaws and Idaho Code, Title 30, Chapter 3, to determine the requirements of corporate records and meetings.

Question No. 7: Do homeowners associations have to comply with the Idaho Open Meeting Law?

Answer: No. The Open Meeting Law applies only to governmental entities. Homeowners associations are private entities. Homeowners associations are generally governed by agreements between the members and the association and their bylaws. Members should consult their association documents and bylaws to determine the association rules for meetings.

¹⁶ See *Safe Air For Everyone v. Idaho State Dep't of Agriculture*, 145 Idaho 164, 177 P.3d 378 (2008); *People v. Carlson*, 328 N.E.2d 675 (Ill. App. Ct. 1975); *Bennett v. Warden*, 333 So.2d 97 (Fla. 1976).

PUBLIC ACTIONS OR ACTIVITIES COVERED BY THE OPEN MEETING LAW

Question No. 8: What constitutes a meeting under the Open Meeting Law?

Answer: The Open Meeting Law defines “meeting” to mean “the convening of a governing body of a public agency *to make a decision or to deliberate toward a decision* on any matter.”¹⁷ “Decision” is then defined to include “any determination, action, vote or final disposition upon a motion, proposal, resolution, order, ordinance or measure on which a vote of a governing body is required, *at any meeting at which a quorum is present.*”¹⁸

The term “deliberation” is also a defined term and means “the receipt or exchange of information or opinion relating to a decision, but shall not include informal or impromptu discussions of a general nature which do not specifically relate to a matter then pending before the public agency for decision.”¹⁹ Note that this does not require any discussion or preliminary decision making. Even the receipt of information relating to a “decision”—i.e., a measure on which the governing body will have to vote—amounts to deliberation, and therefore triggers the definition and requirements of a “meeting” under the Open Meeting Law.

Question No. 9: Does the term “meeting” include such things as informal gatherings, briefing sessions, informal discussions, attendance at social functions, etc.?

Answer: As noted above, a “meeting” is the convening of a governing body to make a decision or deliberate toward a decision. Additionally, a quorum must be present.²⁰

The California Court of Appeals discussed the dual facets of deliberation and action in *Sacramento Newspaper Guild v. Sacramento County Board of Supervisors*:

¹⁷ Idaho Code § 74-202(6) (emphasis added).

¹⁸ Idaho Code § 74-202(1) (emphasis added).

¹⁹ Idaho Code § 74-202(2).

²⁰ *Idaho Water Resources Board v. Kramer*, 97 Idaho 535, 571, 548 P.2d 45, 71 (1976).

It [California's open meeting law] declares the law's intent that deliberation as well as action occur openly and publicly. Recognition of deliberation and action as dual components of the collective decision-making process brings awareness that the meeting concept cannot be split off and confined to one component only, but rather comprehends both and either. To "deliberate" is to examine, weigh and reflect upon the reasons for or against the choice Deliberation thus connotes not only collective discussion, but the collective acquisition and exchange of facts preliminary to the ultimate decision.²¹

The California court then reasoned and ruled:

An informal conference or caucus permits crystallization of secret decisions to a point just short of ceremonial acceptance. There is rarely any purpose to a non-public, pre-meeting conference except to conduct some part of the decisional process behind closed doors. Only by embracing the collective inquiry in discussion stages, as well as the ultimate step of official action, can an open meeting regulation frustrate these evasive devices. As operative criteria, formality and informality are alien to the law's design, exposing it to the very evasions it was designed to prevent. Construed in light of the Brown Act's objectives, the term "meeting" extends to informal sessions or conferences of board members designed for the discussion of public business.²²

A similar result was reached by the Florida Supreme Court in the case of *City of Miami v. Berns* wherein the Florida court ruled that public officials violate Florida's open meeting law when they meet privately or secretly and transact or agree to transact public business at a future time in a certain manner.²³ The Florida court went on to state that, regardless of whether a meeting or gathering is formal or informal, "[i]t is the law's intent that any meetings,

²¹ *Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors*, 69 Cal. Rptr. 480, 485 (Cal. Ct. App. 1968).

²² *Id.* at 487.

²³ *City of Miami v. Berns*, 245 So.2d 38 (Fla. 1971).

relating to any matter on which foreseeable action will be taken, occur openly and publicly.”²⁴

The same considerations must be applied with respect to the Idaho Open Meeting Law. Therefore, it is the opinion of the Attorney General that the provisions of the Open Meeting Law must be complied with whenever a quorum of the members of the governing body of a public agency meets to decide or deliberate on matters which are within the ambit of official business. Those meetings can be formal, informal, or social. So long as a quorum is present and the intent is to deliberate or make a decision, then the meeting must be open.

The requirement that the Open Meeting Law be complied with whenever a quorum of a governing body meets to deliberate or to make a decision should not be evaded by holding smaller meetings with less than a quorum present or by having a go-between contact each of the governing body members to ascertain his/her sentiment.

Question No. 10: Since any meeting of two county commissioners constitutes a quorum under Idaho law, are county commissioners prohibited from having any contact with each other outside of a duly organized open meeting?

Answer: While it is the opinion of the Attorney General that the Open Meeting Law must be complied with whenever a quorum of the members of a governing body of a public agency meet to decide or deliberate on matters which are within the ambit of official business, this Office does not believe that the Legislature intended for the Open Meeting Law to act as a bar to all communications between individual county commissioners outside of open meetings.

Question No. 11: Are adjudicatory deliberations exempt from the Open Meeting Law?

Answer: Only for those agencies expressly exempted. The Open Meeting Law excludes the deliberations of certain agencies (the Board of Tax Appeals, the Public Utilities Commission and the Industrial Commission), in fully submitted adjudicatory proceedings,

²⁴ *Id.* at 41; see also *Canney v. Bd. of Pub. Instruction of Alachua Cnty*, 278 So.2d 260 (Fla. 1973); *Bd. of Pub. Instruction of Broward Cnty v. Doran*, 224 So.2d 693 (Fla. 1969).

from the requirement of open public meeting.²⁵ In creating this exemption for adjudicatory deliberations by only these three agencies, it appears the Legislature intended that non-adjudicatory deliberations at these agencies, and all deliberations at all other agencies—i.e., except for the above-described informal or impromptu discussions of a general nature—must be conducted in a public meeting. Of course, the subject matter under adjudication may be separately identified under the Open Meeting Law as justifying a closed executive session.

Question No. 12: Can I still address questions and comments to a commissioner or board member individually related to a pending matter?

Answer: In other words, as representatives, can I still contact members of a governing body with unsolicited “information or opinion relating to a decision” that is pending before the public agency?²⁶ The Idaho Supreme Court has addressed this specific question.

In *Idaho Historic Preservation Council v. City Council of Boise*, a divided Court overturned a Boise City Council decision that allowed a corporation to demolish a building in Boise.²⁷ In reviewing an appeal from the City’s Preservation Commission, members of the City Council stated at the public [open] meeting that they had received numerous telephone calls concerning the issue. Although the Court framed the issue in terms of due process, it may also raise open meeting questions.

In overturning the City’s decision, the Court stated:

[W]hen a governing body sits in a quasi-judicial capacity, it must confine its decision to the record produced at the public hearing, and that failing to do so violates procedural due process of law. This Court has also observed that when a governing body deviates from the public record, it essentially conducts a second fact-gathering session without proper notice, a clear violation of due process. Since the substance of the telephone calls received by the members of the City Council was not

²⁵ Idaho Code § 74-203(2).

²⁶ Idaho Code § 74-202(2).

²⁷ *Idaho Historic Pres. Council v. City Council of Boise*, 134 Idaho 651, 8 P.3d 646 (2000).

recorded or disclosed at the public hearing, the Commission had no opportunity to rebut any evidence or arguments the City Council may have received from the callers.

Id. at 654, 8 P.3d at 649 (internal citations omitted).

The Court concluded:

This decision does not hold the City Council to a standard of judicial disinterestedness. As explained above, members of the City Council are free to take phone calls from concerned citizens and listen to their opinions and arguments prior to a quasi-judicial proceeding. In order to satisfy due process, however, the identity of the callers must be disclosed, as well as a general description of what each caller said.²⁸

Therefore, in the event that unsolicited information is received and considered by a governing board member, the appropriate action is to disclose the source of the information and the substance of the information so that it may be included within the public record. In sum, any information that you wish to use to form the basis of your decision must be made a part of the public record.

PROCEDURAL REQUIREMENTS OF THE OPEN MEETING LAW

Question No. 13: What are the notice requirements of the Open Meeting Law?

Answer: The Open Meeting Law requires two types of notice: (1) meeting notice and (2) agenda notice. The notice requirements are satisfied by posting meeting notices and agendas in a prominent place at the principal office of the public agency, or, if no such office exists, at the building where the meeting is to be held. The notice for meetings and agendas shall also be posted electronically if the entity maintains an online presence through a website or a social media platform. The Open Meeting Law does not require publication of the notice in a newspaper or advertisement. However, other statutes governing particular entities may require publication of notice.

²⁸ *Id.* at 656, 8 P.3d at 651.

The Open Meeting Law also requires that notice be posted at specific minimum times prior to the meeting. These times vary, depending on the type of meeting being held. The notice of an executive session must state the authorizing provision of law.

Question No. 14: What are the notice and agenda requirements for a regular meeting?

Answer: For “regular meetings,” the Open Meeting Law requires no less than a five (5) calendar day meeting notice and a forty-eight (48) hour agenda notice, unless otherwise provided by statute.²⁹ Any public agency that holds meetings at regular intervals at least once per calendar month, which are scheduled in advance over the course of the year, may satisfy this notice requirement by posting meeting notices at least once each year of its regular meeting schedule. Agenda notice must still be posted at least 48 hours before the meeting.

Question No. 15: What are the notice and agenda requirements for a special meeting or executive session only meeting?

Answer: For “special meetings,” or when only an “executive session” will be held, meeting and agenda notice must be posted at least twenty-four (24) hours before the meeting, unless an emergency exists. An emergency is a situation which involves injury or damage to persons or property, or immediate financial loss, or the likelihood of such injury, damage or loss, when the notice requirements of the section would make such notice impractical, or increase the likelihood or severity of such injury, damage or loss, and the reason for the emergency is stated at the outset of the meeting. This notice and an accompanying agenda must be given by the secretary or other designee of each public agency to any representative of the news media who has requested notification of such meetings and the secretary must make a good faith effort to provide such advance notification to them of the time and place of each meeting.³⁰

Question No. 16: What must an agenda contain?

²⁹ Idaho Code § 74-204.

³⁰ Idaho Code § 74-204(2) and (3).

Answer: What constitutes an “agenda” to satisfy the posting requirement is not set forth in the Open Meeting Law. However, an “agenda” is defined in *Black’s Law Dictionary* (9th ed.) as a “list of things to be done, as items to be considered at a meeting, [usually] arranged in order of consideration.” The agenda notice requirement is not satisfied by merely posting a weekly schedule of the governing board which sets forth the time, place of the meetings, and who is participating. Rather, the notice must specifically set forth the purpose of the meeting and “items of business.” Agenda items should be listed with specificity and not buried in catchall categories such as “director’s report.” An agenda item that requires a vote shall be identified on the agenda as an “action item” to provide notice that action may be taken on that item. Identifying an item as an action item on the agenda does not require a vote to be taken on that item.

Question No. 17: May an agenda be amended after posting?

Answer: Yes. The procedure depends on when the agenda is amended.

More than 48 hours before the start of a meeting (or more than 24 hours before a special meeting), the agenda may be amended simply by posting a new agenda.

Less than 48 hours before the meeting (or less than 24 hours before a special meeting), but before the meeting has started, the agenda may be amended by: (1) posting the new agenda, and (2) making and passing a motion at the meeting to amend the original agenda and stating the good faith reason the new items were not included in the original agenda notice.

After commencement of the meeting, the agenda may be amended to accommodate unforeseen issues, provided that: (1) there is a motion made that states the good faith reason the new item was not on the original agenda, and (2) the motion to amend is adopted by the governing body. Final action may not be taken on an agenda item added after the start of the meeting unless an emergency is declared necessitating action at that meeting. The declaration and justification shall be reflected in the minutes.

To sum up, amending an agenda during a meeting or less than 48 hours before the start of a meeting (24 hours for a special meeting) requires: (1) a motion, (2) a good faith reason why the item was not included in the original agenda, (3) a vote adopting the

amended agenda, and (4) a record of the motion and vote in the minutes of the meeting.

Question No. 18: May qualifications or restrictions be placed on the public’s attendance at an open meeting?

Answer: A public agency may adopt reasonable rules and regulations to ensure the orderly conduct of a public meeting and to ensure orderly behavior on the part of those persons attending the meeting. In *Nevens v. City of Chino*, a California appellate court nullified a city council measure, which prohibited the use of any tape recorders at city council proceedings.³¹ While acknowledging that the city council had an absolute right to adopt and enforce rules and regulations necessary to protect its public meetings, the court held that the rule prohibiting tape recorders was too arbitrary, capricious, restrictive and unreasonable. A similar holding might be reached if a governing body prohibits the use of cameras if their presence is not in fact disruptive of the conduct of the meeting.

Another limitation is that the body cannot make it practically impossible for the public to be present at a meeting. For example, in *Noble v. Kootenai County*, a board of commissioners conducted a site visit to a proposed subdivision. When arriving at the site, the board intentionally avoided a group that was gathered near the entrance to the site location and conducted its site visit outside the group’s hearing. The court held that this was a violation, stating that “Idaho’s open meeting laws . . . are designed to allow the public to be present during agency hearings. At the very least this means that the public must be permitted to get close enough to the hearing body to hear what is being said.”³²

In any event, the governing standard is the reasonableness of the rules and regulations. Use of a timed agenda, “heavy gavel” and/or compliance with Robert’s Rules of Order or some other procedural guideline may serve to facilitate the orderly conduct of a public meeting.

Question No. 19: Does the Open Meeting Law require the governing body of a public agency to accept public comments and testimony during meetings?

³¹ *Nevens v. City of Chino*, 44 Cal. Rptr. 50 (Cal. Ct. App. 1965).

³² *Noble v. Kootenai County*, 148 Idaho 937, 943, 231 P.3d 1034, 1040 (2010).

Answer: No. While other statutes, such as the Local Planning Act, may require the solicitation of public comments, the Open Meeting Law does not expressly require the opportunity for public comment.³³

Question No. 20: May the members of a governing body vote by secret ballot at an open meeting?

Answer: No decision at any meeting of a governing body of a public agency may be made by secret ballot.³⁴

Question No. 21: If a voice vote is used, must the minutes of the meeting reflect the vote of each member of a governing body by name?

Answer: If a voice vote is taken, the minutes of the meeting must reflect the results of all votes, but the minutes need not indicate how each member voted, unless a member of the governing body requests such an indication.³⁵

Question No. 22: May a vote be conducted by written ballots?

Answer: A vote may be conducted by written ballot, but written ballots would not comply with the Open Meeting Law unless the ballots are made available to the public on request and unless the members casting the ballots are identifiable by signature or other discernible means.³⁶ The reason identification of the vote of individual members is treated differently between voice votes and votes by written ballot is that, with respect to voice votes, members of the public in attendance can readily ascertain the vote of individual members of the governing body. In contrast, a vote by written ballot is tantamount to a secret vote, unless such ballot is signed or identifies the name of the voting member.

Question No. 23: What types of records must be maintained under the Open Meeting Law?

³³ See *Coalition for Responsible Government v. Bonner County*, First Judicial District, Bonner County Case No. CV-97-00107 (May 15, 1997) (on file with the Office of the Attorney General).

³⁴ Idaho Code § 74-203(1).

³⁵ Idaho Code § 74-205(1)(c).

³⁶ Attorney General Opinion No. 77-13.

Answer: The Open Meeting Law requires that the governing body of a public agency must provide for the taking of written minutes of all of its meetings, but it is not necessary to make a full transcript or recording of the meeting, except as otherwise provided by law.³⁷ These minutes are public records and must be made available to the general public within a reasonable time after the meeting. The minutes must include, at a minimum, the following information:

- (a) All members of the governing body present;
- (b) All motions, resolutions, orders, or ordinances proposed and their disposition;
- (c) The results of all votes and, upon the request of a member of the governing body, the vote of each member by name.

Other statutes may provide more specific requirements for particular entities.

In addition, section 74-205(2) provides that minutes of executive sessions must be kept, but they need contain only sufficient detail to identify the purpose and topic of the executive session and do not need to include the disclosure of material or matters that compromise the purpose of the executive session. The minutes pertaining to the executive session, however, must include a reference to the specific statutory subsection authorizing the session.

Question No. 24: Are there any prohibitions on where a public meeting may be held?

Answer: Yes. Section 74-203(3) specifically provides: “A governing body shall not hold a meeting at any place where discrimination on the basis of race, creed, color, sex, age or national origin is practiced.” Thus, for example, a public meeting may not be held at a private club if the private club excludes women from membership, even if women are allowed entrance for the purpose of attending the meeting.

Question No. 25: Does the Open Meeting Law permit holding a meeting by telephone conference call?

³⁷ Idaho Code § 74-205(1).

Answer: Yes. The Open Meeting Law specifically authorizes the holding of a meeting by telephone conference call. However, at least one member of the governing body or the director or chief administrative officer must be physically present at the meeting location designated in the meeting notice.³⁸ Additionally, the communications among the members of the governing body must be audible to all persons attending the meeting. Care should also be taken to ensure that votes are not made in such a way to permit an illegal secret ballot or vote.

Question No. 26: Are discussions conducted via telephones, computers, cell phones (including texting) or other electronic means exempted from the Open Meeting Law?

Answer: As discussed in this manual, the Open Meeting Law applies to the deliberations and discussions between two or more members of a board or commission on some matter which foreseeably will come before that board or commission for action. The use of a telephone to conduct such discussions does not remove the conversation from the requirements of the Open Meeting Law.

Similarly, members of a public board may not use computers or texting to conduct private conversations among themselves about board business. A one-way e-mail or text communication from one city council member to another, when it does not result in the exchange of council members' comments or responses on subjects requiring council action, does not constitute a meeting subject to the Open Meeting Law; however, such e-mail or text communications are public records and must be maintained by the records custodian for public inspection and copying.

SPECIFIC STATUTORY EXEMPTIONS: EXECUTIVE SESSIONS

Question No. 27: What types of meetings may be closed under the Open Meeting Law?

Answer: A closed meeting—that is, an “executive session”—may be held for the reasons listed in § 74-206(1):

³⁸ Idaho Code § 74-203(5).

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(a) To consider hiring a public officer, employee, staff member or individual agent, wherein the respective qualities of individuals are to be evaluated to fill a particular vacancy or need, unless a vacancy in an elective office is being filled;

(b) To consider the evaluation, dismissal or disciplining of, or to hear complaints or charges brought against, a public officer, employee, staff member, individual agent or public school student;

(c) To acquire an interest in real property which is not owned by a public agency;

(d) To consider records that are exempt from disclosure as provided by law;

(e) To consider preliminary negotiations involving matters of trade or commerce in which the governing body is in competition with governing bodies in other states or nations;

(f) To communicate with legal counsel for the public agency to discuss the legal ramifications of and legal options for pending litigation, or controversies not yet being litigated but imminently likely to be litigated. The mere presence of legal counsel at an executive session does not satisfy this requirement;

(g) By the commission of pardons and parole, as provided by law;

(h) By the custody review board of the Idaho department of juvenile corrections, as provided by law; or

(i) To engage in communications with a representative of the public agency's risk manager or insurance provider to discuss the adjustment of a pending claim or prevention of a claim imminently likely to be filed. The mere presence of a representative of the public agency's risk manager or insurance provider at an executive session does not satisfy this requirement.

(j) To consider labor contract matters authorized under section 67-2345A [74-206A](1)(a) and (b), Idaho Code.

This provision enumerates specific and not general statutory exemptions to the requirement of conducting an open meeting. It is the Attorney General's opinion that a public agency cannot conduct an executive session to consider general personnel matters, but can only meet in executive session to consider those specifically enumerated personnel matters found at section 74-206(1)(a) and (b); that is, "to consider hiring a public officer, employee, staff member or individual agent" or "to consider the evaluation, dismissal or disciplining of, or to hear complaints or charges brought against, a public officer, employee, staff member, individual agent or public school student." Additionally, Idaho Code section 74-206(3) specifically directs that the exceptions be construed narrowly. No entity should try to "shoehorn" an issue into an executive session exception.

An executive session may be held to consider acquiring an interest in real property that is not owned by a public agency. However, an executive session cannot be held for the purpose of acquiring an interest in real property owned by a public agency.³⁹

It should be noted that the Open Meeting Law establishes circumstances where executive sessions are permissible. In other words, the act authorizes, but does not require, closed meetings. In addition, even though certain enumerated matters may be "considered" in an executive session, it must be emphasized that: "[N]o executive session may be held for the purpose of taking any final action or making any final decision."⁴⁰

It is important to remember that section 74-206(1) sets forth specific procedural steps to be followed to have a valid executive session. *Failure to do so will invalidate any action taken as a result of the executive session. Additionally, it may subject the board members to liability for those actions.* Procedurally, the presiding officer must identify the specific authorization under the Open Meeting Law for the holding of an executive session and at least a two-thirds (⅔) vote in favor of the executive session must be recorded in the minutes of the meeting by individual vote.

³⁹ Attorney General Opinion No. 81-15.

⁴⁰ Idaho Code § 67-2345(4); Attorney General Opinion No. 77-44; Attorney General Opinion No. 81-15.

Question No. 28: What procedure must be followed before an executive session, closed to the public, may be held?

Answer: It must be noted that executive sessions take place only at meetings. Before any executive session may be held, there must be a valid open meeting and a vote to hold an executive session. Every such “meeting” must satisfy the Open Meeting Law’s notice and agenda requirements.⁴¹ If the governing body of a public agency then wishes to consider matters which may legally be considered in a closed meeting, an executive session may be held if two-thirds (2/3) of the members vote to hold an executive session. Prior to such vote, the presiding officer must identify the authorization under the Open Meeting Law for the holding of an executive session. Then, when the vote is taken, the individual vote of each member of the governing body must be recorded in the minutes.⁴²

Question No. 29: May legal counsel meet privately with the governing body of a public agency to discuss threatened or pending litigation?

Answer: Yes. Section 74-206(f) expressly provides that an executive session may be held “[t]o communicate with legal counsel for the public agency to discuss the legal ramifications of and legal options for pending litigation, or controversies not yet being litigated but imminently likely to be litigated.”

Question No. 30: Must the governing body’s attorney be present during an executive session?

Answer: Generally, the governing body’s attorney need not be present when the governing body meets in executive session. An exception is an executive session authorized under Idaho Code section 74-206(1)(f): “To communicate with legal counsel for the public agency to discuss the legal ramifications of and legal options for pending litigation, or controversies not yet being litigated but imminently likely to be litigated. The mere presence of legal counsel at an executive session does not satisfy this requirement.” (Of course, the attorney’s “presence” may be facilitated via a telecommunications device.) An executive session under this subsection is solely for the purpose of communicating with legal counsel on pending or probable litigation.

⁴¹ Idaho Code § 74-204.

⁴² Idaho Code § 74-206(1).

Question No. 31: If a more specific statute requires open meetings and has no provision for executive sessions, is the executive session provision of the Open Meeting Law still applicable?

Answer: Yes. The executive session provision takes precedence over other statutes that may apply to a particular entity. Thus, even if a statute requires all meetings of a governing body to be open, executive sessions may still be held.⁴³

PENALTIES FOR NONCOMPLIANCE

Question No. 32: What is the validity of action taken in violation of the Open Meeting Law?

Answer: If an action, or any deliberation or decision making that leads to an action, occurs at any meeting that fails to comply with the provisions of the Open Meeting Law, such an action may be declared null and void by a court.⁴⁴

Any member of the governing body taking such an action, who participates in any such deliberation, decision making, or meeting, is subject to a civil penalty not to exceed two hundred fifty dollars (\$250).⁴⁵ The maximum civil penalty for a subsequent violation is two thousand five hundred dollars (\$2,500).⁴⁶

Any governing body member who knowingly violates a provision of the Open Meeting Law is subject to a civil penalty of not more than one thousand five hundred dollars (\$1,500).⁴⁷

It is the opinion of the Attorney General that the Idaho Legislature intended that such fines be paid by the individual member of the governing body, not the governing body itself.

Question No. 33: Who enforces the Open Meeting Law?

Answer: The Attorney General enforces the Open Meeting Law in

⁴³ *Nelson v. Boundary County*, 109 Idaho 205, 706 P.2d 94 (Ct. App. 1985).

⁴⁴ Idaho Code § 74-208(1).

⁴⁵ Idaho Code § 74-208(2).

⁴⁶ Idaho Code § 74-208(4).

⁴⁷ Idaho Code § 74-208(3).

relation to the public agencies of state government. County prosecuting attorneys enforce the Open Meeting Law in relation to the local public agencies within their respective jurisdictions.⁴⁸

Any person affected by a violation of the Open Meeting Law is entitled to bring a lawsuit in the magistrates' division of the county in which the public agency normally meets for the purpose of requiring compliance with the provisions of the Open Meeting Law. The lawsuit would ask the court to declare any improper actions void and to enjoin the governing body from violating the Open Meeting Law in the future. Such a lawsuit must be commenced within thirty (30) days of the time of the decision or action that results, in whole or in part, from a meeting that failed to comply with the provisions of the Open Meeting Law. Any other lawsuit must be commenced within one hundred eighty (180) days of the time of the violation.⁴⁹

Question No. 34: If there is a violation of the Open Meeting Law at an early stage in the process, will all subsequent actions be null and void?

Answer: Yes. Section 74-208(1) clearly indicates that an action or any deliberation or decision making that leads to an action, which occurs at any meeting not in compliance with the provisions of the Open Meeting Law, will be null and void. The 1992 Legislature added the "deliberation or decision making that leads to an action" language to the provisions of section 74-208(1). This language clarifies the consequences of a violation under the previous requirement.

The Idaho Supreme Court has held that the procedure for voiding actions taken in violation of the Open Meeting Law must be read literally. Thus, any action may not be declared void if it is not challenged within the thirty-day time limit established by section 74-208(6).⁵⁰

Question No. 35: If a violation of the Open Meeting Law occurs, what can a governing body do to correct the error?

Answer: The governing body should follow the steps outlined in

⁴⁸ Idaho Code § 74-208(5).

⁴⁹ Idaho Code § 74-208(6).

⁵⁰ *Petersen v. Franklin County*, 130 Idaho 176, 938 P.2d 1214 (1997).

Idaho Code § 74-208(7) to “cure” the violation. A violation is cured by repealing any action taken at an illegal meeting or disregarding deliberations made in violation of the Open Meeting Law. Should it choose to, a governing body may, in a properly noticed meeting, repeat the deliberation or decision that occurred at the illegal meeting.

Question No. 36: Are members of the governing body of a public agency criminally liable for violations of the Open Meeting Law in which they knowingly participate?

Answer: The Open Meeting Law specifically provides civil monetary penalties for violations. The Open Meeting Law does not expressly provide for criminal liability for knowing violations. Nonetheless, it is possible that a member of a governing body may be guilty of a misdemeanor for violations of the Open Meeting Law in which he or she knowingly participates.

Idaho Code Section 18-315 provides:

Every willful omission to perform any duty enjoined by law upon any public officer, or person holding any public trust or employment, where no special provision shall have been made for the punishment of such delinquency, is punishable as a misdemeanor.

Idaho Code Section 18-317 states:

When an act or omission is declared by a statute to be a public offense and no penalty for the offense is prescribed in any statute, the act or omission is punishable as a misdemeanor.

In *Alder v. City Council of City of Culver City*, the court considered the California Open Meeting Law (the Brown Act), which included no penalty provisions or provisions for enforcement when violations occur.⁵¹ Relying on two California statutes identical to Idaho Code sections 18-315 and 18-317, the California court ruled that violations of the Open Meeting Law were punishable as misdemeanors even though the Open Meeting Law did not expressly make violations punishable as misdemeanors.

⁵¹ *Alder v. City Council of City of Culver City*, 7 Cal. Rptr. 805 (Cal. Ct. App. 1960).

THE STATUTE

(Idaho Code §§ 74-201 to 74-208)

74-201. Formation of public policy at open meetings. The people of the state of Idaho in creating the instruments of government that serve them, do not yield their sovereignty to the agencies so created. Therefore, the legislature finds and declares that it is the policy of this state that the formation of public policy is public business and shall not be conducted in secret.

74-202. Open Public Meetings—Definitions. As used in this chapter:

(1) “Decision” means any determination, action, vote or final disposition upon a motion, proposal, resolution, order, ordinance or measure on which a vote of a governing body is required, at any meeting at which a quorum is present, but shall not include those ministerial or administrative actions necessary to carry out a decision previously adopted in a meeting held in compliance with this chapter.

(2) “Deliberation” means the receipt or exchange of information or opinion relating to a decision, but shall not include informal or impromptu discussions of a general nature that do not specifically relate to a matter then pending before the public agency for decision.

(3) “Executive session” means any meeting or part of a meeting of a governing body that is closed to any persons for deliberation on certain matters.

(4) “Public agency” means:

(a) Any state board, committee, council, commission, department, authority, educational institution or other state agency created by or pursuant to statute or executive order of the governor, other than courts and their agencies and divisions, and the judicial council, and the district magistrates commission;

(b) Any regional board, commission, department or authority created by or pursuant to statute;

(c) Any county, city, school district, special district, or other municipal corporation or political subdivision of the state of Idaho;

(d) Any subagency of a public agency created by or pursuant to statute or executive order of the governor, ordinance, or other legislative act; and

(e) Notwithstanding the language of this subsection, the cybersecurity task force or a committee awarding the Idaho medal of achievement shall not constitute a public agency.

(5) “Governing body” means the members of any public agency that consists of two (2) or more members, with the authority to make decisions for or recommendations to a public agency regarding any matter.

(6) “Meeting” means the convening of a governing body of a public agency to make a decision or to deliberate toward a decision on any matter.

(a) “Regular meeting” means the convening of a governing body of a public agency on the date fixed by law or rule, to conduct the business of the agency.

(b) “Special meeting” is a convening of the governing body of a public agency pursuant to a special call for the conduct of business as specified in the call.

74-203. Governing bodies—Requirement for open public meetings.

(1) Except as provided below, all meetings of a governing body of a public agency shall be open to the public and all persons shall be permitted to attend any meeting except as otherwise provided by this act. No decision at a meeting of a governing body of a public agency shall be made by secret ballot.

(2) Deliberations of the board of tax appeals created in chapter 38, title 63, Idaho Code, the public utilities commission and the industrial commission in a fully submitted adjudicatory proceeding in which hearings, if any are required, have been completed, and in which the legal rights, duties or privileges of a party are to be determined are not required by this act to take place in a meeting open to the public. Such deliberations may, however, be made and/or conducted in a public meeting at the discretion of the agency.

(3) Meetings of the Idaho life and health insurance guaranty association established under chapter 43, title 41, Idaho Code, the Idaho

insurance guaranty association established under chapter 36, title 41, Idaho Code, and the surplus line association approved by the director of the Idaho department of insurance as authorized under chapter 12, title 41, Idaho Code, are not required by this act to take place in a meeting open to the public.

(4) A governing body shall not hold a meeting at any place where discrimination on the basis of race, creed, color, sex, age or national origin is practiced.

(5) All meetings may be conducted using telecommunications devices which enable all members of a governing body participating in the meeting to communicate with each other. Such devices may include, but are not limited to, telephone or video conferencing devices and similar communications equipment. Participation by a member of the governing body through telecommunications devices shall constitute presence in person by such member at the meeting; provided however, that at least one (1) member of the governing body, or the director of the public agency, or the chief administrative officer of the public agency shall be physically present at the location designated in the meeting notice, as required under section 74-204, Idaho Code, to ensure that the public may attend such meeting in person. The communications among members of a governing body must be audible to the public attending the meeting in person and the members of the governing body.

74-204. Notice of meetings—Agendas.

(1) Regular meetings. No less than a five (5) calendar day meeting notice and a forty-eight (48) hour agenda notice shall be given unless otherwise provided by statute. Provided however, that any public agency that holds meetings at regular intervals of at least once per calendar month scheduled in advance over the course of the year may satisfy this meeting notice by giving meeting notices at least once each year of its regular meeting schedule. The notice requirement for meetings and agendas shall be satisfied by posting such notices and agendas in a prominent place at the principal office of the public agency or, if no such office exists, at the building where the meeting is to be held. The notice for meetings and agendas shall also be posted electronically if the entity maintains an online presence through a website or a social media platform.

(2) Special meetings. No special meeting shall be held without at least a twenty-four (24) hour meeting and agenda notice, unless an emergency exists. An emergency is a situation involving injury or

damage to persons or property, or immediate financial loss, or the likelihood of such injury, damage or loss, when the notice requirements of this section would make such notice impracticable, or increase the likelihood or severity of such injury, damage or loss, and the reason for the emergency is stated at the outset of the meeting. The notice required under this section shall include at a minimum the meeting date, time, place and name of the public agency calling for the meeting. The secretary or other designee of each public agency shall maintain a list of the news media requesting notification of meetings and shall make a good faith effort to provide advance notification to them of the time and place of each meeting.

(3) Executive sessions. If only an executive session will be held, a twenty-four (24) hour meeting and agenda notice shall be given according to the notice provisions stated in subsection (2) of this section and shall state the reason and the specific provision of law authorizing the executive session.

(4) An agenda shall be required for each meeting. The agenda shall be posted in the same manner as the notice of the meeting. An agenda may be amended, provided that a good faith effort is made to include, in the original agenda notice, all items known to be probable items of discussion. An agenda item that requires a vote shall be identified on the agenda as an “action item” to provide notice that action may be taken on that item. Identifying an item as an action item on the agenda does not require a vote to be taken on that item.

(a) If an amendment to an agenda is made after an agenda has been posted but forty-eight (48) hours or more prior to the start of a regular meeting, or twenty-four (24) hours or more prior to the start of a special meeting, then the agenda is amended upon the posting of the amended agenda.

(b) If an amendment to an agenda is proposed after an agenda has been posted and less than forty-eight (48) hours prior to a regular meeting or less than twenty-four (24) hours prior to a special meeting but prior to the start of the meeting, the proposed amended agenda shall be posted but shall not become effective until a motion is made at the meeting and the governing body votes to amend the agenda.

(c) An agenda may be amended after the start of a meeting upon a motion that states the reason for the amendment and states the good faith reason the agenda item was not included in

the original agenda posting. Final action may not be taken on an agenda item added after the start of a meeting unless an emergency is declared necessitating action at that meeting. The declaration and justification shall be reflected in the minutes.

74-205. Written minutes of meetings.

(1) The governing body of a public agency shall provide for the taking of written minutes of all its meetings. Neither a full transcript nor a recording of the meeting is required, except as otherwise provided by law. All minutes shall be available to the public within a reasonable time after the meeting, and shall include at least the following information:

- (a) All members of the governing body present;
- (b) All motions, resolutions, orders, or ordinances proposed and their disposition;
- (c) The results of all votes, and upon the request of a member, the vote of each member, by name.

(2) Minutes pertaining to executive sessions. Minutes pertaining to an executive session shall include a reference to the specific statutory subsection authorizing the executive session and shall also provide sufficient detail to identify the purpose and topic of the executive session but shall not contain information sufficient to compromise the purpose of going into executive session.

74-206. Executive sessions—When authorized.

(1) An executive session at which members of the public are excluded may be held, but only for the purposes and only in the manner set forth in this section. The motion to go into executive session shall identify the specific subsections of this section that authorize the executive session. There shall be a roll call vote on the motion and the vote shall be recorded in the minutes. An executive session shall be authorized by a two-thirds ($\frac{2}{3}$) vote of the governing body. An executive session may be held:

- (a) To consider hiring a public officer, employee, staff member or individual agent, wherein the respective qualities of individuals are to be evaluated in order to fill a particular vacancy or need. This paragraph does not apply to filling a

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vacancy in an elective office or deliberations about staffing needs in general;

(b) To consider the evaluation, dismissal or disciplining of, or to hear complaints or charges brought against, a public officer, employee, staff member or individual agent, or public school student;

(c) To acquire an interest in real property which is not owned by a public agency;

(d) To consider records that are exempt from disclosure as provided in chapter 1, title 74, Idaho Code;

(e) To consider preliminary negotiations involving matters of trade or commerce in which the governing body is in competition with governing bodies in other states or nations;

(f) To communicate with legal counsel for the public agency to discuss the legal ramifications of and legal options for pending litigation, or controversies not yet being litigated but imminently likely to be litigated. The mere presence of legal counsel at an executive session does not satisfy this requirement;

(g) By the commission of pardons and parole, as provided by law;

(h) By the custody review board of the Idaho department of juvenile corrections, as provided by law; or

(i) To engage in communications with a representative of the public agency's risk manager or insurance provider to discuss the adjustment of a pending claim or prevention of a claim imminently likely to be filed. The mere presence of a representative of the public agency's risk manager or insurance provider at an executive session does not satisfy this requirement.

(j) To consider labor contract matters authorized under section 74-206 (1)(a) and (b), Idaho Code.

(2) The exceptions to the general policy in favor of open meetings stated in this section shall be narrowly construed. It shall be a violation

of this act to change the subject within the executive session to one not identified within the motion to enter the executive session or to any topic for which an executive session is not provided.

(3) No executive session may be held for the purpose of taking any final action or making any final decision.

74-206A. Negotiations in Open Session.

(1) All negotiations between a governing board and a labor organization shall be in open session and shall be available for the public to attend. This requirement also applies to negotiations between the governing board's designated representatives and representatives of the labor organization. This requirement shall also apply to meetings with any labor negotiation arbitrators, mediators or similar labor dispute meeting facilitators. Provided, however, a governing board or its designated representatives may hold an executive session for the specific purpose of:

(a) Considering a labor contract offer or to formulate a counteroffer; or

(b) Receiving information about a specific employee, when the information has a direct bearing on the issues being negotiated and a reasonable person would conclude that the release of that information would violate that employee's right to privacy.

(2) All documentation exchanged between the parties during negotiations, including all offers, counteroffers and meeting minutes shall be subject to public writings disclosure laws.

(3) Any other provision notwithstanding, including any other provisions to the contrary in sections 33-402 and 74-204, Idaho Code, the governing body shall post notice of all negotiation sessions at the earliest possible time practicable. This shall be done by the governing body by immediately posting notice of the negotiation session on the front page of its official website. If time permits, the governing body shall also post notice within twenty-four (24) hours at its regular meeting physical posting location.

(4) Public testimony, if any, shall be posted as an agenda item.

74-207. Open legislative meetings required. All meetings of any standing, special or select committee of either house of the legislature of the state of Idaho shall be open to the public at all times, except in extraordinary circumstances as provided specifically in the rules of procedure in either house, and any person may attend any meeting of a standing, special or select committee, but may participate in the committee only with the approval of the committee itself.

74-208. Violations.

(1) If an action, or any deliberation or decision making that leads to an action, occurs at any meeting which fails to comply with the provisions of this chapter, such action shall be null and void.

(2) Any member of the governing body governed by the provisions of this chapter, who conducts or participates in a meeting which violates the provisions of this act shall be subject to a civil penalty not to exceed two hundred fifty dollars (\$250).

(3) Any member of a governing body who knowingly violates the provisions of this chapter shall be subject to a civil penalty not to exceed one thousand five hundred dollars (\$1,500).

(4) Any member of a governing body who knowingly violates any provision of this chapter and who has previously admitted to committing or has been previously determined to have committed a violation pursuant to subsection 3 of this section within the twelve (12) months preceding this subsequent violation shall be subject to a civil penalty not to exceed two thousand five hundred dollars (\$2,500).

(5) The attorney general shall have the duty to enforce this chapter in relation to public agencies of state government, and the prosecuting attorneys of the various counties shall have the duty to enforce this act in relation to local public agencies within their respective jurisdictions. In the event that there is reason to believe that a violation of the provisions of this act has been committed by members of a board of county commissioners or, for any other reason a county prosecuting attorney is deemed disqualified from proceeding to enforce this act, the prosecuting attorney or board of county commissioners shall seek to have a special prosecutor appointed for that purpose as provided in section 31-2603, Idaho Code.

(6) Any person affected by a violation of the provisions of this chapter may commence a civil action in the magistrate division of the

district court of the county in which the public agency ordinarily meets, for the purpose of requiring compliance with provisions of this act. No private action brought pursuant to this subsection shall result in the assessment of a civil penalty against any member of a public agency and there shall be no private right of action for damages arising out of any violation of the provisions of this chapter. Any suit brought for the purpose of having an action declared or determined to be null and void pursuant to subsection (1) of this section shall be commenced within thirty (30) days of the time of the decision or action that results, in whole or in part, from a meeting that failed to comply with the provisions of this act. Any other suit brought under the provisions of this section shall be commenced within one hundred eighty (180) days of the time of the violation or alleged violation of the provisions of this act.

(7) [Curing a violation.]

(a) A violation may be cured by a public agency upon:

(i) The agency's self-recognition of a violation; or

(ii) Receipt by the secretary or clerk of the public agency of written notice of an alleged violation. A complaint filed and served upon the public agency may be substituted for other forms of written notice. Upon notice of an alleged open meeting violation, the governing body shall have fourteen (14) days to respond publicly and either acknowledge the open meeting violation and state an intent to cure the violation or state that the public agency has determined that no violation has occurred and that no cure is necessary. Failure to respond shall be treated as a denial of any violation for purposes of proceeding with any enforcement action.

(b) Following the public agency's acknowledgment of a violation pursuant to paragraph (a)(i) or (a)(ii) of this subsection, the public agency shall have fourteen (14) days to cure the violation by declaring that all actions taken at or resulting from the meeting in violation of this act void.

(c) All enforcement actions shall be stayed during the response and cure period but may recommence at the discretion of the complainant after the cure period has expired.

(d) A cure as provided in this section shall act as a bar to the imposition of the civil penalty provided in subsection (2) of this section. A cure of a violation as provided in subsection (7)(a)(i) of this section shall act as a bar to the imposition of any civil penalty provided in subsection (4) of this section.

**SUMMARY OF DECISIONS INTERPRETING THE IDAHO
OPEN MEETING STATUTE**

IDAHO ATTORNEY GENERAL'S OFFICE

REPORTED DECISIONS

1. *Petersen v. Franklin County*, 130 Idaho 176, 938 P.2d 1214 (1997) (actions that violate Open Meeting Law that are not challenged within the time limit established by Idaho Code § 67-2347(4) are not void).
2. *Student Loan Fund of Idaho, Inc. v. Payette County*, 125 Idaho 824, 875 P.2d 236 (Ct. App. 1994) (merely alleging violation of Open Meeting Law, without additionally alleging a specific “palpable injury,” is insufficient to confer standing).
3. *Gardner v. Evans*, 110 Idaho 925, 719 P.2d 1185 (1986) (an aggrieved party will not prevail in a claim for improper notice under the Open Meeting Law when they cannot demonstrate any disadvantage stemming from the deficient notice).
4. *Nelson v. Boundary County*, 109 Idaho 205, 706 P.2d 94 (Ct. App. 1985) (Open Meeting Law’s provisions authorizing executive sessions preempt Idaho Code § 31-713’s requirement that all meetings of county commissioners must be public).
5. *Gardner v. School Dist. No. 55*, 108 Idaho 434, 700 P.2d 56 (1985).
6. *Baker v. Ind. School Dist. of Emmett*, 107 Idaho 608, 691 P.2d 1223 (1984).
7. *State v. City of Hailey*, 102 Idaho 511, 633 P.2d 576 (1981).
8. *Idaho Water Resources Board v. Kramer*, 97 Idaho 535, 548 P.2d 35 (1976).
9. *Nelson v. Boundary County*, 109 Idaho 205, 706 P.2d 94 (Ct. App. 1985).
10. *Idaho Historic Preservation Council v. City Council of Boise*, 134 Idaho 651, 8 P.3d 646 (2000).

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11. *Farrell v. Lemhi County Board of Commissioners*, 138 Idaho 378; 64 P.3d 304 (2002).
12. *State v. Yzaguirre*, 144 Idaho 471, 163 P.3d 1183 (2007).
13. *Safe Air For Everyone v. Idaho State Dep't. of Agri.*, 145 Idaho 164, 177 P.3d 378 (2008).
14. *City of McCall v. Buxton*, 146 Idaho 656, 201 P.3d 629 (2009).
15. *Idaho Press Club, Inc. v. State Legislature of the State*, 142 Idaho 640, 132 P.3d 397 (2006).
16. *Fox v. Estep*, 118 Idaho 454, 797 P.2d 854 (1990).
17. *Acheson v. Klauser*, 139 Idaho 156, 75 P.3d 210 (Idaho Ct. App. 2003).
18. *Noble v. Kootenai County ex rel. Kootenai County Bd. of Comm'rs*, 148 Idaho 937, 231 P.3d 1034 (2010), reh'g denied (May 19, 2010).

UNREPORTED DECISIONS

(On File with the Office of Attorney General)

1. *Coalition for Responsible Government v. Bonner County*, First Judicial District, No. CV-97-00107 (1997)
2. *State v. Thorne, et al.*; Idaho Fourth Judicial District No. 3L-97763 (1994).
3. *Playfair v. S. Lemhi Sch. Dist. 292 Bd. of Trustees*, CIV. 09-375, 2009 WL 2474205 (D. Idaho Aug. 12, 2009).
4. *Kline v. Power County Board of Commissioners*, Idaho Sixth Judicial District No. CV-2011-0248 & CV-2011-0279 (2012).

ATTORNEY GENERAL'S OFFICE ANALYSES

1. Attorney General Opinion No. 08-3, 2008 WL 4360202.
2. Attorney General Opinion 85-9, (December 31, 1985) 1985 WL 167852.
3. Attorney General Opinion 89-7, (July 19, 1989) 1989 WL 4084.

**State of Idaho
Office of the Attorney General**

OPEN MEETING LAW CHECKLIST

Regular Meetings

Meeting Date and Time: _____

Meeting Location: _____

[Idaho Code § 74-203(4) and (5)]

Before Meeting

- Meeting Notice posted 5 or more calendar days prior to the meeting date.
[Idaho Code § 74-204(1)]
- Agenda Notice posted at least 48 hours prior to the meeting.
[Idaho Code § 74-204(1)]
- Posting of Amended Agenda [Idaho Code § 74-204(4)]

During Meeting

- First: Any agenda amendments? [Idaho Code § 74-204(4)(b) and (c)]
- Secretary or other person appointed to take minutes.
[Idaho Code § 74-205(1)]

After Meeting

- Minutes available to the public within a reasonable time after the meeting.
[Idaho Code § 74-205(1)]

State of Idaho
Office of the Attorney General
OPEN MEETING LAW CHECKLIST
Special Meetings

Meeting Date and Time: _____

Meeting Location: _____

[Idaho Code § 74-203(4) and (5)]

Before Meeting

- Meeting and Agenda Notice posted **at least 24 hours** prior to the meeting. [Idaho Code § 74-204(2)]
- Notification provided to the news media. [Idaho Code § 74-204(2)]
- Posting of Amended Agenda [Idaho Code § 74-204(4)]

During Meeting

- First: Any agenda amendments? [Idaho Code § 74-204(4)(b) and (c)]
- Secretary or other person appointed to take minutes. [Idaho Code § 74-205(1)]

After Meeting

- Minutes available to the public within a reasonable time after the meeting. [Idaho Code § 74-205(1)]

**State of Idaho
Office of the Attorney General
OPEN MEETING LAW CHECKLIST
*Executive Sessions***

Session Date and Time: _____

Session Location: _____

[Idaho Code § 74-203(4) and (5)]

Executive Session Only

- Meeting and Agenda Notice posted **at least 24 hours** prior to the session. [Idaho Code § 74-204(3)]
- Posting of Amended Agenda [Idaho Code § 74-204(4)]

Executive Session During Regular or Special Meeting

- Motion to enter Executive Session to discuss one of the exemptions listed in Idaho Code § 74-206.
- $\frac{2}{3}$ vote to enter Executive Session reflected in regular/special meeting minutes. [Idaho Code § 74-206(1)]

During Session

- First: Any agenda amendments? [Idaho Code § 74-204(4)(b) and (c)]
- Secretary or other person appointed to take minutes. [Idaho Code § 74-205(1)]

After Session

- Minutes must reference statutory subsection authorizing executive session and identify purpose and topic of session. [Idaho Code § 74-205(2)]
- Minutes available to the public within a reasonable time after the meeting. [Idaho Code § 74-205(1)]

>> **SAMPLE FORM** <<

Public Agency: _____, Idaho
(name of county, city, district, etc.)

Governing Body: _____
(i.e., "Board of County Commissioners", "City Council", etc.)

Meeting Date, Time and Location: _____

EXECUTIVE SESSION MOTION AND ORDER

_____ (print name), _____ (print title),
MOVES THAT THE BOARD, PURSUANT TO IDAHO CODE § 74-206, CONVENE
IN EXECUTIVE SESSION TO: (identify one or more of the following)

- Consider personnel matters [Idaho Code § 74--206(1)(a) & (b)]
- Deliberate regarding an acquisition of an interest in real property [Idaho Code § 74-206(1)(c)]
- Consider records that are exempt from public disclosure [Idaho Code § 74-206(1)(d)]
- Consider preliminary negotiations involving matters of trade or commerce in which this governing body is in competition with another governing body [Idaho Code § 74-206(1)(e)]
- Communicate with legal counsel regarding pending/imminently-likely litigation [Idaho Code § 74-206(1)(f)]
- Communicate with risk manager/insurer regarding pending/imminently-likely claims [Idaho Code § 74-206(1)(i)]

Purpose/Topic summary (required): _____
AND THE VOTE TO DO SO BY ROLL CALL.

CONVENE AT: _____ ADJOURN AT: _____

	<u>YES</u>	<u>NO</u>	<u>ABSTAIN</u>
_____, Chair (print name)	_____	_____	_____
_____, Member (print name)	_____	_____	_____
_____, Member (print name)	_____	_____	_____

Clerk/Deputy Clerk: _____
(Signature)

>> **SAMPLE FORM** <<

Public Agency: _____, Idaho
(name of county, city, district, etc.)

Governing Body: _____
(i.e., "Board of County Commissioners", "City Council", etc.)

Meeting Date, Time and Location: _____

MOTION AND ORDER TO AMEND AGENDA

(less than 48 hours before regular meeting or 24 hours before special meeting)

_____ (print name), _____ (print title),
MOVES THAT THIS GOVERNING BODY, PURSUANT TO IDAHO CODE § 74-204, AMEND THE AGENDA FOR THIS MEETING AS FOLLOWS:

Good faith reason item not included in posted agenda (required):

	<u>YES</u>	<u>NO</u>	<u>ABSTAIN</u>
_____, Chair (print name)	_____	_____	_____
_____, Member (print name)	_____	_____	_____
_____, Member (print name)	_____	_____	_____

Clerk/Deputy Clerk: _____
(Signature)

Curing Process – Idaho Code § 74-208(7)

